IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.267 OF 1995.

1. Ramnihor Dwarka Vishwakarma.

2. Shivmurat Ramnihor Vishwakarma

3. Ramesh @ Kalya Ramnihor Vishwakarma

all residing at Ramnagar,
Dombivli (East),
Dist : Thane .. Appellants.

V/s.

The S.K.Patil English Medium Schools
through its Organiser
D.A.Samant. .. Respondents.

Mr.K.Y. Mandlik, Adv. for the Appellant .

Mr.S.V.Parsuledesai, Adv. for the Respondents.

CORAM : S.R. SATHE, J.

DATED : 29TH JULY, 2004.

P.C. :

1. Being aggrieved by the judgment and order passed by the Court of Additional District Judge, Thane, in Civil Appeal No.44 of 1990, whereby the appeal was allowed and plaintiff's suit for possession was allowed and the order

passed by the trial court dismissing the suit was set aside, the original defendants have preferred this second appeal.

2. Brief facts giving rise to this appeal are as under :

. Plaintiff is an Educational Institution running primary and secondary schools and junior college at Dombivli. The Andhra Valley Power Supply Company Limited popularly known as Tata Authorities allotted 29 gunthas of land to the Plaintiff on lease. Thus, plaintiff was in possession of the suit land. It is the Plaintiffs case that taking advantage of the Plaintiffs absence, the defendant made an encroachment on some portion of the said land and constructed temporary shade admeasuring 26ft X 90ft and 15ft X 10ft. Though the defendants were asked to remove the said shade and handover the possession, they failed to do so. Hence the plaintiff filed suit for possession and mandatory injunction directing the defendants to remove the structure. The Defendants filed their written statement and contended that the suit land was never owned and possessed by the plaintiff but on the contrary the same was in defendants possession for more

than 20 years. They also raised several other contentions including that the suit was bad for non joinder of necessary parties as all trusties of plaintiff Trust were not impleded in the suit.

3. On these pleadings the learned trial judge framed issues and after considering the evidence adduced by both the parties came to the conclusion that the plaintiffs have failed to prove the alleged encroachment. He also held that the defendants also failed to prove that they were in actual possession of the suit property for more than 20 years as contended by them. He further observed that the suit was bad for non joinder of necessary parties. He, therefore, dismissed the suit. Being aggrieved by the same the Plaintiffs filed Civil Appeal No. 44 of 1990. The Appellate Court came to the conclusion that the alleged encroachment is proved and the suit was not bad for non joinder of necessary parties. He, therefore, allowed the appeal and decree passed by the trial court was set aside. Being aggrieved, the original defendant has filed this second appeal.

4. In this appeal before me the only substantial question of law that has been urged through Shri Mandlik,

learned Advocate for the appellant is that the suit was bad for non joinder of the necessary parties. According to him the Plaintiff is a Public trust and as such it was necessary to implede all the trustees in the said suit. Admittedly, in the present suit all the trustees are not included. However, it is the case of the plaintiff that the Managing trustees had full power to file such suit in such capacity. The learned Advocate for the appellant has placed reliance on the case of Atmaram Ranchodbhai v.Gulamhusein Gulam Mohiyaddin and other, reported in AIR 1973 Gujarat 113, wherein it has been held that unless the instrument of trust otherwise provides, all co-trustees must join in filing a suit to recover possession of the property from the tenant. Firstly, it is to be mentioned that facts of the above mentioned ruling and facts of the present case are quite different. In that case the possession was sought from the tenant while in the instant case possession is sought from the trespasser. Naturally, the ratio of the above cited ruling is not applicable to the facts of the present case. On the contrary, there are various authorititive pronouncements in which it has been held that manager or the Defacto trustees can file a suit for possession against the tresspasser with a view to protect the trust’s property. So, merely because the other

co-trustees have not been joined in the instant suit either as plaintiff or defendant it cannot be said that the suit was bad for misjoinder of parties. So, I think there is no substance in the argument advanced by the learned advocate for the appellant in this behalf. Hence appeal is dismissed with cost. However, the defendants are granted time to remove the shade and hand over the possession till 31st August, 2004.

(S.R.Sathe, J.)